

STATE OF MICHIGAN
COURT OF APPEALS

WENDY JEAN BOTHWELL,

Plaintiff-Appellee,

v

SCOTT LEE BOTHWELL,

Defendant-Appellant.

UNPUBLISHED

January 22, 2004

No. 250106

Kalamazoo Circuit Court

LC No. 87-003135-DM

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

This child custody case arises from plaintiff mother's refusal to permit defendant father parenting time with the parties' two children for a period that spanned ten years following their 1990 divorce and from plaintiff's refusal to return the parties' children to the custody of defendant in violation of the trial court's April 3, 2000, order that awarded defendant physical custody of the children.¹ On April 9, 2003, three years after the order granting defendant physical custody of the children was entered, plaintiff filed a motion seeking sole custody over the children and child support. The trial court granted plaintiff temporary custody over the minor child, Katelyn, pending an evidentiary hearing, and denied defendant's motion for summary disposition. Defendant appeals as of right. We conclude that, although plaintiff's conduct should not be rewarded or condoned, the trial court properly determined the issues before it as they bear on the question of the best interests of Katelyn. Therefore, we affirm.

Defendant first argues that the trial court erred in granting plaintiff temporary physical custody of the minor child without first conducting an evidentiary hearing to determine whether a custodial environment existed and the best interests of the child. A trial court's custody decision is a discretionary dispositional ruling that should be affirmed unless it constitutes an abuse of discretion. MCL 722.28; *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 24; 581 NW2d 11 (1998). Questions of law are reviewed for clear legal error. *Id.*

¹ Because the eldest child has since turned eighteen years of age, this case involves the custody of the younger child, Katelyn Bothwell.

A trial court cannot order a change of custody without first holding an evidentiary hearing to determine if the change would be in the child's best interests. *Mann v Mann*, 190 Mich App 526, 531; 476 NW2d 439 (1991). A trial court may modify or amend its previous judgments or orders concerning child custody for "proper cause shown or because of change of circumstances," and if it is in the best interests of the child. MCL 722.27(1)(c). However, "[i]n adopting [MCL 722.27(1)(c)], the Legislature intended to 'minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment,' except in the most compelling cases.'" *Mann, supra* at 531, quoting *Baker v Baker*, 411 Mich 567, 576-577; 309 NW2d 532 (1981). Because "situations might arise in which an immediate change of custody is necessary or compelled for the best interests of the child pending a hearing with regard to a motion for a permanent change of custody," *Mann, supra* at 533, a trial court may "[t]ake any other action considered to be necessary in a particular child custody dispute." MCL 722.27(1)(e).

While it is generally true that trial courts cannot order a change of custody without first holding an evidentiary hearing, the facts in this case are precisely the type of situation where entry of an order granting plaintiff temporary physical custody was appropriate. Despite the fact that defendant was granted sole physical custody of the minor child on April 3, 2000, the reality of the situation was that the minor child had resided with plaintiff since the original judgment of divorce on April 9, 1990, and that the transfer of physical custody to defendant was never effectuated in accordance with the April 3, 2000 custody order. The trial court recognized the actuality of the situation that the minor child had lived with plaintiff for thirteen years, and the court sought to effectuate the purpose of the child custody act by ensuring that the status quo would remain in place until an evidentiary hearing could be held to determine whether a permanent change in custody was in the child's best interests. In light of the circumstances of this case, we conclude that the court did not err in granting plaintiff temporary physical custody of the minor child to ensure that the child's established custodial environment was not disrupted pending an evidentiary hearing to determine whether a permanent change in custody was warranted.

Defendant next argues that the trial court erred when it declined to force plaintiff to complete the psychological and child custody evaluation the court had previously ordered. Given the facts in this case, we disagree.

In determining the best interests of the child, a trial court may utilize "the community resources in behavioral sciences and other professions in the investigation and study of custody disputes and consider their recommendations for the resolution of the disputes." MCL 722.27(d). A trial court may, in its discretion, appoint a behavioral scientist to submit a report to the court to assist it in determining the best interests of the child, but that denial of a party's motion for such an evaluation does not constitute error. *Nichols v Nichols*, 106 Mich App 584, 588; 308 NW2d 291 (1981).

Plaintiff was evaluated on August 16, 2000, but refused subsequent interviews and did not bring the minor children to any sessions with the examiner. However, the record establishes that the parties and the two minor children underwent about five psychological evaluations over the course of the thirteen-year custody litigation. The court's decision not to require plaintiff and the minor child to attend further psychological evaluations was based in part on the age of the minor child and the court did not believe that further psychological evaluations were necessary

or appropriate. We conclude that the court acted in its sound discretion pursuant to MCL 722.27(d).

Defendant next argues that the trial court erred in denying his motion for summary disposition pursuant to MCR 2.116(C)(8), that defendant filed on the ground that plaintiff's motion for change of custody failed to state a claim upon which relief could be granted. We initially note that the trial court erred in addressing plaintiff's motion to change custody in the context of defendant's motion for summary disposition. A motion for summary disposition may be brought only to dismiss a claim or defense, and is therefore not a proper response to a motion for a change of custody. MCR 2.116(B)(1). In any event, we conclude that the trial court reached the correct result in allowing plaintiff to proceed with her motion to change custody.

MCR 3.210(C)(7) provides that "in deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion." See also *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

Defendant argues that plaintiff did not demonstrate proper cause or a change in circumstances, as was required for the trial court to consider whether a modification of custody was appropriate based on the best interest factors. MCL 722.27(c)(1). Defendant's argument is misplaced. Plaintiff's motion for change of custody established proper cause to re-examine the statutory best interest factors to determine if a change of custody was warranted. Despite the fact that defendant had technical physical custody from the April 3, 2000 order, plaintiff retained actual physical custody of the children since entry of the original judgment of divorce on April 9, 1990. Plaintiff demonstrated proper cause sufficient for the trial court to consider custody modification.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot